Date: July 19, 1996
Case No.: 94-INA-00582

In the Matter of:

CHUCK E. CHEESE'S,
Employer

On Behalf of:

NELSON R. VASQUEZ,
Alien

Appearance: Michael E. McKenzie, Esq.
For the Employer

Before: Huddleston, Vittone, and Wood
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On August 13, 1993, Check E. Cheese's ("Employer") filed an application for labor certification to enable Nelson Rulando Vasquez ("Alien") to fill the position of Cook (AF 36-37). The job duties for the position are:

> Prepares, seasons, and cooks meats, vegetables, desserts, and other foodstuffs for consumption in eating establishments: Reads menu to estimate food requirements and orders food from supplier or procures food from storage. Bakes, and roasts meats, vegetables, and sauces, and other foods. Adds seasoning to foods during mixing or cooking, according to personal judgment and experience.

The requirements for the position are two years of experience in the job offered or as a Cook-helper. "Other Special Requirements" are to be willing to be available to work anytime required by the Employer to substitute for absent employees between the hours of 9:00 a.m. and 11:00 p.m.

The CO issued a Notice of Findings on October 28, 1993 (AF 32-33), proposing to deny certification on the grounds that the Employer has provided no evidence that its present employees were recruited or considered for the higher position that the Alien was promoted to. Also, the CO stated that the application contains no information as to the basis upon which the Alien was selected for the higher position over similarly situated company employees. Accordingly, the Employer was notified that it had until December 2, 1993, to rebut the findings or to cure the defects noted.

In its rebuttal, dated November 6, 1993 (AF 30-31), the Employer contended that it

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

posted the notice of job opportunity and that no applicants applied.

The CO issued a Second Notice of Findings on December 27, 1993 (AF 27-29), again proposing to deny certification. The Employer's requirements for a Cook are stated as two years of experience in the job offered or two years of experience in a related occupation as a cook helper. The CO found that these requirements exceed those defined in the *Dictionary of Occupational Titles* (DOT), which are six months to one year of combined education, training, and experience. Accordingly, the Employer was notified that it had until January 31, 1994, to rebut the findings or to cure the defects noted.

The Employer submitted its rebuttal to the second Notice of Findings on January 11, 1994 (AF 25-26). The Employer contended that the SVP used according to the DOT definition for the listed position should be 7, or up to two years, not an SVP of 5, which is six months to one year.

The CO issued the Final Determination on April 22, 1994 (AF 22-24), denying certification because the Employer has failed to comply with Federal regulations at 20 C.F.R. § 656. The CO determined that the limited menu offered by the Employer does not support the designation of Cook, DOT 313.361-014, but should be coded as Cook, Fast Food, DOT 313.374-010. Accordingly, the CO found unduly restrictive job requirements and denied the application.

On May 26, 1994, and August 2, 1994, the Employer requested review of the Denial of Labor Certification (AF 1-2, 4-21). The CO denied reconsideration on June 28, 1994, and on August 19, 1994, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). The Employer submitted a Brief on October 5, 1994.

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*., 87-INA-569 (Jan. 13, 1989) (*en banc*). Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* ("DOT"), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity of the requirement.

A job opportunity has been described without unduly restrictive requirements where the requirements do not exceed those defined for the job in the DOT and are normally required for a job in the U.S. *Lebanese Arak Corp.*, 87-INA-683 (Apr. 24, 1989) (*en banc*); *Duarte Gallery, Inc.*, 88-INA-92 (Oct. 11, 1989). Hence, prior to an analysis of business necessity, consideration must be given to whether the particular job requirement is normally required or falls within the applicable DOT code. *Tri-P's Corp.*, 87-INA-686 (Feb. 17, 1989) (*en banc*).

The crux of this case is whether the job is properly classified as a Cook (see, DOT at 313.361-014), or a Cook, Fast Food (see DOT at 313.374-010). The CO contends that the position is properly classified as a Cook, Fast Food, which requires only six months to one year of training or experience, and the Employer's requirement of two years of experience is, therefore, excessive. The Employer contends that the position is properly classified as a Cook, and the requirement of two years of experience is, therefore, within the training and experience levels stated in the DOT.

The Employer additionally contends that the position cannot be classified as Cook, Fast Food, because it involves the additional duties of a pizza baker and a dessert maker (AF 26). The Employer also argues in its brief that the CO erred in relying on his investigation of Chuck E. Cheese franchises in Philadelphia, when the position in question is in Virginia, erred when he issued a final determination after the Employer's requests for clarification in rebuttal, erred by assigning the position a different DOT code, and erred in his characterization of the position as Fast Food without the Employer's authorization (Employer's Brief at 2-3).

Regardless of where the franchise is located, the record does contain photographs of the menu board and a birthday party menu from the Employer (AF 40-47). Based on that evidence, we agree with the CO that the Employer offers a very limited menu. Moreover, the burden is on the Employer to establish certification, and show that the CO is incorrect regarding the consistency of the franchise menus and the preparation of that menu. Regarding confusion and requests for clarification by the Employer, there were two NOF's issued in this case, and the Employer understood the issue sufficiently to respond to the issue in both the 2nd NOF and in its brief. We find that the CO did not err in issuing the Final Determination after the 2nd rebuttal. The CO is not bound by any actions of the local office. *Peking Gourmet*, 88-INA-323 (May 11, 1989); *Aeronautical Marketing Corp.*, 88-INA-143 (Aug. 4, 1988). The CO has both the authority and the duty to change the DOT classification designated by the Employer or the local office, should he or she feel it is warranted.

There has been no evidence presented by the Employer that the position is required to "prepare[s], seasons, and cooks meats and vegetables" or "[b]akes, and roasts meats, vegetables and sauces," as required in the DOT definition of Cook. While the definition of Cook, fast food, does not include the baking of brownies, breadsticks, and birthday cakes, the CO stated that

these items are likely prepackaged franchise items and require little knowledge of actual baking (AF 23-24). The Employer has not offered any evidence that shows this position requires the skills of a "Baker" as it stated in its 2nd rebuttal.

The burden of proof for establishing labor certification is on the Employer. 20 C.F.R. 656.2(b). We find that the Employer has not established that the position is that of a Cook, and not that of Cook, fast food, as determined by the CO. The CO's denial of labor certification was, therefore, proper.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered this the August 20, 2002 for the Panel:

Richard E. Huddleston
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.